No. 86-1729

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

STATE OF CALIFORNIA, *ex rel.* STATE LANDS COMMISSION,
Petitioner,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS-INTERVENORS, SIERRA CLUB and NATURAL RESOURCES DEFENSE COUNCIL

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QUESTIONS PRESENTED

(1) Whether the federal common law of reliction must be applied, as between the United States and the State of California, to determine the ownership of lands exposed as a result of recession of Mono Lake;

(2) Whether the recession was relictive within the meaning of the common law requirement that it be imperceptible in its progress.

RULE 28.1 LISTING

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STATEMENT OF THE CASE

The intervenors concur in the Statement of Facts of the United States, but wish to supplement that statement. Mono Lake reached its historic high stand in 1919 (6428 feet) and since that date has generally declined. C.R. # 108, ¶ 5. In 1940 the Lake's elevation was 6417 feet. Ct. Ex. 2-A at 76-77. This eleven foot decline from the 1919 historic high stand was solely attributable to natural causes. C.R. # 108, ¶ 22. The decline since 1940 is attributable primarily to upstream diversions by the City of Los

Angeles but is, in part, attributable to natural causes. C.R. # 108, ¶ 22.[1]

Congress has recognized substantial and continuing federal interests in the littoral uplands at Mono Lake. When in 1931 Congress withdrew the public lands surrounding and adjacent to Mono Lake from entry under the public land laws, Pub. Law No. 864, 46 Stat. 1530, it provided in § 2 of that Act that nothing "shall be construed as affecting the use or occupation of the withdrawn lands for recreational or grazing purposes under such rules and regulations as the Secretary of Interior may deem necessary to conserve the natural forage resources of the area."[2] The historic recreational uses of those lands in the Mono Basin consisted of hunting, swimming, and boating, and depended upon access to the Lake across the federal littoral uplands.[3] Congress

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[1] The State claims, Petition at 4, that "[t]he lake's decline is therefore wholly attributable to diversions from the Mono Basin." This statement is untrue both in respect to its decline since the historic high stand of 1919 and since 1941, the date of commencement of the diversions. The trial court found that:

> Two significant declines since the high stand of 1919 have resulted in exposure of land around Mono Lake. The first decline, from 1919 to 1935, was caused by drought. The second, from 1945 to 1981, was caused primarily by diversions of streamflow to Los Angeles. Climatological factors contributed to the later decline in the sense that the diversions took place during a period of significantly below-average precipitation during many of those years.

C.R. # 108, ¶ 22.

[2] Section 2 of the Act was added to the bill by the Senate Committee on Public Lands and Surveys in order "*to protect and safeguard the Federal* as well as the city's *interests.*" S.R. No. 1726, February 17, 1931, 71st Cong., 3d Sess., at 6 (emphasis added), quoting a Memorandum from Acting Commissioner Havell of the General Land Office to the Secretary of Interior dated February 13, 1931.

[3] *See City of Los Angeles v. Aitken*, 10 Cal. App. 2d 460, 52 P.2d 585, 587 (1935).

thus intended to preserve federal jurisdiction over these uplands to assure that water-related recreational uses would continue.[4]

In 1984, Congress reaffirmed the longstanding federal interests in the withdrawn lands around Mono Lake by designating, in Title III of Public Law 98-425, 98 Stat. 1619, the Mono Basin National Forest Scenic Area.[5] Section 304(b)(1) charges the

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[4] The legislative history of the Act makes clear congressional intent to preserve existing recreational uses and federal control over the lands in the Mono Basin. *See* statements of Senator Hiram Johnson, 74 Cong. Rec. 6952 (1931) and Congressman Swing, 74 Cong. Rec. 2802, 2806, 2807, 2810 (1931). Prior to its consideration of the bill which became the Act of 1931, Congress had taken up a bill to authorize the Secretary of the Interior to *sell* the lands in the Mono Basin and Owens Valley to Los Angeles, thereby divesting the federal government of all interest in the lands. *Hearings before Senate Committee on Public Lands and Surveys, H. R. 11969*, 71st Cong., 3d Sess. (February 5 and 6, 1931), p. 96. However, the Congressional representatives of the people who lived in Mono and Inyo Counties argued that it was not good policy to allow Los Angeles to acquire title and take the lands out of their existing grazing, mineral, and recreational uses. These objections led to the rewriting of the legislation to provide for withdrawal, instead of sale. *Id.*, pp. 96-7, 99, 100, 102, 103 (Statement of Rep. William Evans of Glendale, sponsor of H. R. 11969 in the House). This assured that federal jurisdiction would be maintained, and that the lands could continue to be used for recreational and grazing purposes.

[5] Respondents do not assert that Title III expresses a specific congressional purpose to reserve the relictions to federal uplands around Mono Lake, but rather that the Act reaffirms the extensive federal interests in those uplands. The House of Representatives passed H.R. 1437, comprising Titles I, II and III of the California Wilderness Act of 1984, on April 12, 1984. 98 Stat. 1638. The Senate passed H.R. 1437, with amendments to Titles I and II, on August 9, 1984. *Id.* On September 12, 1984, the House reconsidered the bill as amended by the Senate. Representative Lehman of California stated that the language of Title III was to be "entirely neutral" on the resolution of the controversy over ownership of the bed, and that Title III was not "intended to have any effect on the pending litigation." 1984 Cong. Rec. 9431 (1984).

Representative Lehman's remarks do not purport to qualify the federal upland interests which Congress specifically reaffirmed by

Secretary with managing the Scenic Area to protect its geologic, ecologic, and cultural resources. The Secretary is required to provide for recreational use of the Scenic Area as well as for scientific study and research. *Id.* Under Section 304(e) the Secretary is to formulate a detailed and comprehensive management plan, which shall provide for hunting and fishing (including commercial brine shrimp operations) within the Scenic Area. Section 304(j) provides that "[e]xisting community recreational uses, as of the date of enactment of this title, shall be permitted at the levels and locations customarily exercised."[6] Section 307 provides that the Secretary shall insure nonexclusive access to Scenic Area lands by Indian people for traditional cultural and religious purposes, including the harvest of the brine fly larvae.[7] Section 304(g)(1) withdraws all the federal lands within the

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designating the Mono Basin National Forest Scenic Area. Moreover, these remarks should not be given binding interpretive effect even as regards a putative House view on the pending litigation. Representative Lehman did not express his views until *after* the House had concluded debate and assented to the provisions of Title III. *A fortiori*, the remarks cannot reasonably govern this Court's construction of the intent of the Senate, which had no opportunity to affirm or disavow the view expressed by Representative Lehman. *See Department of Air Force v. Rose*, 425 U.S. 352, 365-66 (1976) (endorsing *Vaughan v. Rosen*, 523 F.2d 1136, 1142-43 (D.C. Cir. 1975), which declined to give binding interpretive effect to remarks made during one house's passage without amendment of a bill which the other house had already passed); *United Mine Workers, Etc. v. Federal Mine, Etc.*, 671 F.2d 615, 622 (D.C. Cir. 1982); *Jordan v. United States Dept. of Justice*, 591 F.2d 753, 768-69 (D.C. Cir. 1978); *Weinberger v. Rossi*, 456 U.S. 25, 35 n.15 (1982).

[6] This provision continues into present law the intent of the 1931 act that historical grazing and recreational uses be continued.

[7] Brine Fly (*Ephydra hians*) larvae are found in tens of thousands at the lake's edge, at the shoreline. If the United States is not deemed to own the exposed lands adjacent to the water, it can neither insure access by Indian peoples to the shoreline for the brine fly harvest, pursuant to Section 307, nor provide for access to the Lake for hunting or fishing (including commercial brine shrimp operations), pursuant to Section 304(e).

Scenic Area from entry under the mining laws, mineral leasing laws, and the Geothermal Steam Act of 1970.

REASONS FOR DENYING THE WRIT

I. FEDERAL COMMON LAW MUST BE APPLIED AS THE RULE OF DECISION IN THIS CASE

A. The Submerged Lands Act Requires Application of a Uniform Federal Rule of Accretion to Determine Title to Lands of the United States Riparian or Littoral to Navigable Bodies of Water

The Submerged Lands Act, 43 U.S.C. §§ 1301-1315, requires a federal rule of decision here. In *California ex rel. State Lands Commission v. United States*, 457 U.S. 273 (1982), this Court based its holding that the federal common law of accretion must supply the rule of decision, as between the United States as upland owner and the State of California as owner of land below tidelands, on the premise that in the Submerged Lands Act, "Congress has addressed the issue of accretions to federal land." 457 U.S. at 283. Section 5 of the Act, 43 U.S.C. § 1313(a), withheld all "accretions" to lands acquired or retained by the United States from the confirmation in the states of title to lands below navigable waters.[8]

The withholding of accretions to federal uplands from the confirmation of title in the States to submerged lands provides a firm basis for the application here, as in *California ex rel. State*

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[8] 43 U.S.C. § 1313(a) reserves from the confirmation of title to the states in all lands below navigable waters accretions to "all lands which the United States lawfully holds under the law of the State . . . ." 43 U.S.C. §§ 1301(a)(1) defines the term "lands beneath navigable waters" as including:

> all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction . . . .

Lands Commission, of the federal common law of accretion. That in this case lands formerly submerged below inland waters are involved does not distinguish this case from *California ex rel. State Lands Commission*. The State argues, Petition at 13-15, that the Submerged Lands Act only confirmed its preexisting title to lands below inland navigable waters and was not intended to supply a uniform federal rule of decision for accretions to federally owned uplands adjacent to inland waters. That contention is unsupported by the legislative history of the Act.

In *United States v. California*, 332 U.S. 19, 30 (1947), this Court affirmed title in the United States to land underlying the Pacific Ocean off the coast of California. In the course of its opinion, the Court, per Justice Black, stated that California had "*qualified* ownership of lands under *inland* navigable waters." 332 U.S. at 30 (emphasis added). When Congress enacted the Submerged Lands Act, supra, in 1953, it noted its concern that *United States v. California* cast doubt upon the states' long-established title to lands underlying inland navigable waterways within their own boundaries.[9]

In enacting the Submerged Lands Act, Congress declared its purpose, *inter alia*, to establish the titles of the respective states to lands underlying *inland* navigable waterways within their boundaries.[10] The Submerged Lands Act's establishment of state title

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[9] "State officials from every inland State in the Union, except three, testified or submitted statements that in their opinion the decision had clouded the long-asserted titles of the inland States to lands and natural resources below navigable waters within the boundaries of the inland States." H.R. Rep. No. 1778, 80th Cong., 2d Sess., *reprinted in* 1953 U.S. Code Cong. & Admin. News 1425. *See also* S. Rep. No. 133, 83rd Cong., 1st Sess., *reprinted in* 1953 U.S. Code Cong. & Admin. News 1480; 99 Cong. Rec. 2693 (remarks of Sen. Cordon); 99 Cong. Rec. 2750 (remarks of Sen. Holland).

[10] "The purpose of this legislation is to write the law for the future as the Supreme Court believed it to be in the past—that the States shall own . . . all lands under navigable waters within their territorial jurisdiction, whether inland or seaward. . . . " S. Rep. No. 133, 83rd Cong., 1st Sess., *reprinted in* 1953 U.S. Code Cong. & Admin. News 1481. "Title II merely fixes as the law of the land that which, throughout our history

was not unqualified. Congress was careful to provide that the boundaries of federally owned upland would change as necessary in order to maintain contiguity with rivers and lakes.[11] In particular, Congress expressly provided in Section 5(a) of the Act, 43 U.S.C. § 1313(a), that accretions to *federally* owned uplands should accrue to the United States. During debate on the bill, Sen. Cordon explained, "The purpose of the language is to reserve to the United States those facilities and those areas which are used by the Government in its governmental capacity for one or more of its governmental purposes."[12]

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prior to the Supreme Court decision in the California case in 1947, was generally believed and accepted to be the law of the land; namely, that the respective States are the sovereign owners of the land beneath navigable waters within their boundaries. . . . The areas affected by title II include lands beneath navigable inland waters, such as lakes, . . . rivers, ports, harbors, bays, etc. . . . . " H.R. Rep. No. 695, 82d Cong., 1st Sess., *reprinted in* 1953 U.S. Code Cong. & Admin. News 1399 (footnotes omitted).

[11] The final version of the bill passed by the Congress included an amendment to the definition of "lands beneath navigable waters" which specified that these lands were to extend "up to the ordinary high water mark *as heretofore or hereafter modified by accretion, erosion, and reliction.*" S. Rep. No. 133, 83rd Cong., 1st Sess., *reprinted in* 1953 U.S. Code Cong. & Admin. News 1487 (discussing Submerged Lands Act, ch. 65, Title 1, sec. 2(a)(1) (codified at 43 U.S.C. 1301(a)(1) (emphasis added)). The Senate Committee on Interior and Insular Affairs explained that the committee's purpose was to ensure that the "nontidal or inland areas, title to which is legislatively recognized as being in the States, should not be limited to the submerged lands beneath inland navigable waters as they existed at the time statehood was acquired. The new language would recognize the changes that have taken place since admission." *Id.* at 1492. During debate on the bill, Sen. Cordon explained that the definition was amended "in order to take care of a movement from one side of a channel to another, or erosion on one side and build-up or reliction on the other side." 99 Cong. Rec. 2630.

[12] 99 Cong. Rec. 2619. *See also* 99 Cong. Rec. 2699 (remarks of Sen. Cordon).

Congress intended that the Act's reservation of accretions to federal uplands be broadly interpreted and uniformly applied. No legislative intent to distinguish between naturally and artificially caused accretions or relictions is evident in the ordinary meaning of the plain language of the Act or in its legislative history.[13] Since, according to Congress, the Act "treats all of the States alike, both inland and coastal, with respect to lands beneath navigable waters within their respective boundaries,"[14] application of idiosyncratic state law definitions of accretion and reliction enabling a few states to retain title to exposed lakebeds would frustrate the purpose expressed by Congress in the Submerged Lands Act to reserve title to accretions and relictions to federal uplands for governmental purposes.

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[13] The Senate Committee on Interior and Insular Affairs explained that within the meaning of the Act, " '[r]eliction' refers to lands that once were submerged but have become uncovered, either by the land rising or the waters receding." S. Rep. No. 133, 83rd Cong., 1st Sess., *reprinted in* 1953 U.S. Code Cong. & Admin. News 1493. The common law rule is that "accretions, *regardless of cause*, accrue to the upland owner." *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 285 (1982) (emphasis added). The Senate Committee's definition of reliction makes no distinction between artificially and naturally caused relictions.

[14] S. Rep. No. 133, 83rd Cong., 1st Sess., *reprinted in* 1953 U.S. Code Cong. & Admin. News 1480. The Act makes no distinction between inland and coastal waters with respect to application of the rules of accretion. In a concurring opinion in *California ex rel. State Land Comm'n*, Justice Rehnquist, joined by Justice Stevens and Justice O'Connor, noted:

> [T]he *Wilson* rule applies to oceanfront property as well as river-front property where the Federal Government is the littoral owner. *Wilson* should apply to the movement of the high-water mark along the ocean in a fashion similar to the way it applies to changes in the bed of a navigable stream. In the instant case, as in *Wilson*, it is irrelevant that the accretion, as a geographical "fact," formed on land within the State's dominion, be it a river bottom or the ocean tidelands.

457 U.S. at 289-90 (Rehnquist, J., concurring).

Section 5 of the Submerged Lands Act thus declares the intent of Congress to have federal uplands governed uniformly by the ancient common law rule of accretion, which existed at the time of California's admission as a state and which vests title to accreted lands in the upland owner. *See California ex rel. State Lands Commission v. U.S.*, 457 U.S. at 284 (referring to the federal law of accretion as having been "settled" for over one hundred years).[15] The declaration of Section 5 is dispositive for purposes of choosing a federal rule of decision, for it expresses a congressional policy to treat accretions and relictions to federal uplands uniformly in title disputes between the states and the federal government. By reserving accretions and relictions, Congress intended that in disputes between the United States and the States, federal common law as to accretion, erosion, and reliction should govern.

A uniform federal rule of accretion is necessitated by the substantial amount of federally owned uplands which have value by reason of their contiguity to navigable waters.[16] Application of California law to this case would create a band of state land around Mono Lake, separating the United States owned uplands from the water.[17] Unless accretions or relictions to federal uplands

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[15] Referring to the Submerged Lands Act in *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 324 (1973), this Court stated: "The Act did not abrogate the federal law of accretion, but defined lands beneath navigable waters as being those covered by streams as 'hereafter modified by accretion, erosion, and reliction.'"

[16] According to the report, Public Land Statistics, U.S. Department of Interior, Bureau of Land Management, 1971, p.3, there are a total of 2,263,587,200 acres of public land (*exclusive of national forests and parks*) and 50,090,880 acres of inland waters, including lakes, reservoirs, streams, sloughs, and estuaries associated with such lands. The report does not tabulate the number of acres of riparian and/or littoral federally owned uplands.

[17] In any such state owned band, mineral development and production could occur adjacent to the Mono Lake Scenic Recreation Area. The relicted lands have substantial mineral value, C.R. # 91, ¶ 102. If, however, under the federal law of accretion, the lands are within the Scenic Area because title to them is in the federal government, no

are deemed to belong to the United States as owner of the uplands, water-dependent recreational, as well as grazing and other uses of federal lands, would be impaired.[18]

B. There Is Ancient Common Law Doctrine, Applied Many Times by the Federal Courts For The Last 150 Years, Which Is Settled And Appropriately Applied to Determine Whether A Reliction Has Taken Place

The balancing test prescribed in *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), does not apply where there exists a well-settled federal rule of decision relevant to the particular matter in issue. In *Wilson*, the question was "[w]hether to adopt state law or to *fashion* a nationwide federal rule." 442 U.S. at 672 (emphasis added). There, the absence of an extant federal standard and the consequent need to "fashion" one were essential prerequisites to the applicability of the balancing test.

In *Omaha Indian Tribe v. Wilson*, 575 F.2d 620, (8th Cir. 1978), *rev'd*, 442 U.S. 653 (1979), the court of appeals applied federal common law to determine whether sudden and perceptible shifts of the thalweg which did not leave identifiable land in place constituted avulsion. 575 F.2d at 634. *See Wilson*, 442 U.S. at 663 n.12. The court, pointing out uncertainties in the federal common law of avulsion on this question, noted that some decisions required only impetuosity, 575 F.2d at 634-35 (discussing *St. Louis v. Rutz*, 138 U.S. 226 (1891)), while others also required identifiability, *id.* at 635 (discussing *Nebraska v. Iowa*, 143 U.S. 359 (1892)). These federal precedents give rise to two conflicting lines of authority. *See* 575 F.2d at 635-37 (contrasting Nebraska decisions with several federal cases adhering to the impetuosity rationale). *See also Wilson*, 442 U.S. at 663 n.12.

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mineral development could occur. *See* Section 304(g)(1) of Public Law 98-425.

[18] For example, in the Boundary Waters Canoe Area Wilderness Act of 1978, Pub.L. No. 95-495, 92 Stat. 1649, Congress reserved federal riparian and littoral lands for recreational boating uses that would be impaired if title to federal uplands did not follow the water boundary.

Nevertheless, the court of appeals discerned a coherent federal common law standard, and ruled that identifiability was not a prerequisite for avulsion. 575 F.2d at 637. In reversing the court of appeals, this Court described the disposition by the court below as "[r]eviewing *what it perceived to be* the federal common law of accretion and avulsion . . . with no more than passing reference to Nebraska law on the issue." *Wilson*, 442 U.S. at 662 (emphasis added). This Court found the court of appeals "in error for *arriving at* a federal standard, independent of state law, to determine whether there had been an avulsion or an accretion." *Id.* at 678-79 (emphasis added).

Unlike the dispute in *Wilson*, there is no need to "arrive at" or "fashion" a federal rule of decision here. The federal common law of accretion and reliction applicable to the facts of this case is clear and unambiguous. Where accretion or reliction occurs, regardless of cause, title to the accreted or exposed lands vests in the upland owner. *California ex rel. State Lands Comm'n v. United States*, 457 U.S. at 284-85 (1982). Where, as here, there exists a readily discernible and certain federal rule of decision relevant to a matter governed by federal law, there is no need to balance governmental interests because the necessity to either "adopt or fashion" a rule of decision does not arise.

Had the shifting of the river channel in *Wilson* necessitated application of long-settled rules of accretion rather than an unresolved election between alternative definitions of an avulsion, *see Wilson, supra*, 442 U.S. at 663, n.12, federal common law would have been the rule of decision, because there is an established federal common law of accretion, and the Submerged Lands Act requires application of a uniform federal rule of accretion. In *California, ex rel. State Lands Commission v. United States*, referring to the federal common law of accretion as "settled", this Court reaffirmed the principle that "accretions, regardless of cause, accrue to the upland owner," 457 U.S. at 284-285, and stated:

> Moreover, this is not a case in which federal common law must be *created*. For over one hundred years it has been settled under federal law that the right to future accretions is an inherent and essential attribute of the littoral or riparian

> owner. *New Orleans v. United States*, 10 Pet. 662, 717 (1836); *County of St. Clair v. Lovingston*, 23 Wall. 46, 68 (1874). "Almost all jurists and legislators, both ancient and modern, have agreed that the owner of the land thus bounded is entitled to these additions." *Jefferis v. East Omaha Land Co.*, 134 U.S. 178, 189 (1890), quoting *Banks v. Ogden*, 2 Wall. 57, 67 (1865).

457 U.S. at 284.

Since Roman times, the law of alluvion has been applied to the same problem presented by this case—whether changes in land exposure arising from changes in the level of a body of water over time are accretive or avulsive.[19] The critical inquiry in determin-

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[19] In recognition of the fact of nature that over time any boundary formed by a watercourse will ambulate, the English common law describes four types of physical changes to water boundaries—accretion, reliction, erosion, and avulsion. F. Clark, The Law of Surveying and Boundaries, § 566-74 (4th ed. 1976). The first three describe changes that are gradual. Avulsion occurs when a physical change to the boundary formed by a watercourse occurs suddenly and abruptly. *Id.* at § 572. *See Philadelphia v. Stimson*, 223 U.S. 605, 624 (1912). *See also* Halsbury, *Laws of England* (4th Ed.), Waters § 294-300.

When accretion, reliction, or erosion occurs, the title to the land follows the watercourse. Under the common law rule, land formed by a gradual deposition of soil upon the shore of an upland owner bounded by water belongs to the upland owner. *United States v. Aranson*, 696 F.2d 654, 659 (9th Cir. 1983). Land which becomes exposed by the gradual recession of water belongs to the riparian owner from whose shore or bank the water has receded. *United States v. Ruby Co.*, 588 F.2d 697, 701 n.4 (9th Cir. 1978). The law of accretion and reliction is identical. "Reliction" and "accretion" are terms used interchangeably, and their legal effects on the upland property owner are identical. *Bear v. United States*, 611 F. Supp. 589, 593 (1985). In contrast, an avulsive change results in no change of land ownership. 3 *American Law of Property*, 15.26-.27 (A.J. Casner ed. 1952).

There are three identifiable policy considerations underlying the doctrine of accretion-reliction. *See generally Alluvio and the Common Law*, 99 Law Quarterly Review 412 (1983); Lundquist, *Artificial Additions to Riparian Land: Extending the Doctrine of Accretion*, 14

ing the legal consequences to boundaries formed by ambulatory watercourses is whether the change occurred gradually and imperceptibly, or whether the change was sudden and abrupt. In *County of St. Clair v. Lovingston,* 90 U.S. 46 (1974), this Court determined, under the law of alluvion, ownership of certain lands that had been created in the harbor of the City of St. Louis by the Missouri River. After discussing the ancient Roman and common law of accretion, 90 U.S. at 66-67, this court stated:

> In the light of the authorities alluvion may be defined as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. It is different from reliction, and is the opposite of avulsion. *The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. Whether it is the effect of natural or artificial causes makes no difference.* The result as to the ownership in either case is the same. The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property.

Arizona L.R. 315 at 322-24 (1972); and *Bonelli Cattle Co. v. Arizona,* 414 U.S. at 326-27 (1973). The first and foremost consideration is that since the adjacent riparian owner bears the risk of loss of property through gradual physical changes to boundaries formed by watercourses (erosion), the adjacent riparian owner should also benefit from the addition of property by accretion or reliction. *County of St. Clair v. Lovingston,* 90 U.S. 46, 69 (1874). A second policy is that the riparian owner's access to adjacent water should be protected. *Hughes v. State of Washington,* 389 U.S. 290, 293-94 (1967). "By requiring that the upland owner suffer the burden of erosion and by giving him the benefit of accretions, riparianness is maintained." *Bonelli,* 414 U.S. at 326. The third policy consideration is based on the governmental interest in providing reliably ascertainable boundaries. *Purvine v. Hathaway,* 393 P.2d 181, 183 (Ore. 1964). These considerations do not dictate the application of identical legal consequences for avulsive changes since avulsions are rare, often temporary, and in the case of a sudden change in a river channel, one upland owner still has access to the water. *See Nebraska v. Iowa,* 143 U.S. 359 (1891).

90 U.S. at 68-69 (emphasis added). Since similar issues are presented by this case, application of the well-settled doctrine of accretion is warranted.

II. THE WELL-SETTLED RULES OF THE LAW OF ACCRETION ARE APPLICABLE TO LAKES UNDER THE FACTS OF THIS CASE

This venerable common law doctrine is applicable to artificially induced recessions of inland lakes, notwithstanding the contention of the State that the federal common law of reliction has not been applied to inland lakes under the circumstances of this case. Petition at 20-21. This Court applied the doctrine of accretion to a freshwater lake, Lake Michigan, in *Banks v. Ogden*, 69 U.S. 57 (1864). There the Court described the doctrine of accretion as governing additions made to land bounded by a river, lake, or sea, and concluded: "There is no question in this case that the accretion from Lake Michigan belongs to the proprietor of land bounded by the lake." 69 U.S. at 67. *See also Jones v. Johnston*, 59 U.S. 150 (1859) (accretion due to artificial causes on Lake Michigan belongs to upland owner). In *Jefferis v. East Omaha Land Co.*, 134 U.S. 178 at 189 (1890), this Court, citing *Banks v. Ogden*, restated the applicability of the law of accretion to lakes.

A. There is No Exception to the Common Law Rule of Reliction Where Lakes Are Uncovered Intentionally or "Drained"

Petitioner asserts that courts will not apply the reliction doctrine where lakes are uncovered intentionally or drained. Petition at 19-22. This statement is based upon what is, at best, a minority state view, not reflected in any federal case. The majority of cases hold otherwise. In *Heise v. Village of Pewaukee*, 285 N.W.2d 859, 864 (Wis. 1979), the court applied the reliction rule to a lake where exposure of land was caused by a reclamation project. *See also De Simone v. Kramer*, 252 N.W.2d 653, 657 (Wis. 1977). In *State Engineer v. Cowles Brothers Inc.*, 478 P.2d 159 (Nev. 1970), the Nevada Supreme Court applied the reliction doctrine to award title to a *dry lake bed* to the upland owners as against the State of Nevada. The lake had dried up due to an increased

withdrawal of waters from the Truckee River for irrigation purposes.

Even if Petitioner is correct in its contention that there is a "drainage" exception to the common law rule, no "drainage" has taken place at Mono Lake. Almost one-sixth of the total acreage of lakebed exposed to date was exposed from 1919 to 1940, when the upstream diversions commenced. Between 1919 and 1940, Mono Lake fluctuated over a range of 11 feet. CE-2A, p. 76, Figure IV-10A. This 11 foot recession was entirely due to natural conditions. C.R. #108, ¶¶ 17, 22. Clearly, all lands exposed prior to 1940 were not exposed by a "drainage."[20] The so-called "drainage" exception is plainly inapposite to those lands exposed between 1919 and 1940.[21]

Moreover, in licensing the upstream diversions of the feeder streams for the benefit of the City of Los Angeles, the State of California was certainly not acting in furtherance of commerce and navigation on the Lake itself by engaging in a reclamation or drainage project.[22] In fact, the Lake will not be "drained" as a result of the upstream diversions, for, "assuming a continuation of the past climactic conditions and a diversion of 100,000 acre feet

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[20] Over 2,000 acres were exposed between 1919 and 1940. CE-2A, p. 69, Table IV-5. At the date of judgment in the trial court, a total of 14,000 acres of former lakebed lands had been exposed. C.R. #108, ¶ 14. Even the recession since 1940 has in some part been attributable to significantly below average precipitation. C.R. #108, ¶ 22.

[21] Even under the rule of decision urged by the State, the United States would have title to the band of lakebed that was exposed from 1919-1940. Under the State's drainage rule, however, lands exposed after 1941 would belong to the State. Under other circumstances, as where artificial exposure preceded natural recession, this could lead to the absurd result that federally owned uplands would not be contiguous to federally owned relictions.

[22] A "drainage, as applied to land, contemplates removal of water by artificial channel or trench." Words and Phrases, *Drainage*. A "drainage" implies a conveyance of water away from a lake or river. No water is being conveyed out of Mono Lake. The diversions occur upstream in some of its feeder streams.

per year by Los Angeles, the Lake would stabilize in the year 2147 at an elevation of 6336 feet, some 112 feet above the measured deepest point of Mono Lake." C.R. 108, ¶ 18. At that point the Lake would still occupy an area of 40 square miles. *Id.*

The few cases cited by Petitioner, at 21, declare minority state rules that have no analog in federal common law.[23] Most of the cases have a common thread—the interests of the state in retaining title to lands purposefully reclaimed by expensive public

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[23] The majority of states continue to apply the common law rule of accretion even where there has been reclamation or a project by the state to improve navigability. *See Heise v. Village of Pewaukee*, (applying common law of reliction in a reclamation situation); *Michaelson v. Silver Beach Improvement Assn*, 173 N.E.2d 273, 277 (Mass. 1961) (accretion doctrine to be applied unless state has undertaken navigation improvement projects pursuant to its navigation powers *and* the project is necessary to accomplish protection of navigation or fisheries); *Pugh Coal Co. v. State of Wisconsin*, 312 N.W.2d 856 (Wisc. 1981); *Lakeside Boating and Bathing, Inc. v. State of Iowa*, 344 N.W.2d 217 (Iowa 1984). In fact, almost all states recognize the common law rule that artificially caused accretions have the same impact upon riparian or littoral title as those caused naturally. *See, e.g., Brundage v. Knox*, 117 N.E. 123 at 128 (Ill. 1917) (holding accretion had occurred although caused by city reclaiming bed of Lake Michigan); *State by Kay v. Sause*, 342 P.2d 803 (Ore. 1959); 63 *A.L.R.3d* 254 *et seq.* ("*Accretion Caused By Artificial Conditions*").

Many of the cases which refuse to apply the reliction doctrine in settings of reclamation, drainage, or harbor or navigable water-way improvement characterize the changes produced by the state project as "sudden." To that extent, the cases are really "avulsion" cases which do not depart from the common law doctrine. Two of the four cases cited by Petitioner to support its contention there is a drainage exception to the reliction doctrine, Petition at 21, are such "avulsion" cases. *See State v. Longyear Holding Co.*, 29 N.W.2d 657 (Minn. 1947) (sudden change in water level); *Garrett v. State of New Jersey*, 289 A.2d 542 (1972) (avulsion); *Noyes v. Collins*, 61 N.W. 250 (Iowa 1894) (disappearance of water suddenly drying up lake completely). These cases may be read alternatively as an expression of the minority rule of *Carpenter v. City of Santa Monica*, 63 Cal. App. 2d 772 (1944), that exposure due to artificial causes does not accrue to the benefit of the upland owner. *See State v. Longyear Holding Co., supra*, 29 N.W.2d at 667.

works projects implemented by the state.[24] Where, as here, no reclamation project or drainage is involved, incorporating into the federal common law of accretion the "drainage" exception (apparently recognized only by Florida) would be improper.[25]

B. Under Federal Common Law, the Cause of An Accretion or Reliction is Immaterial, Unless It Is Caused By the Upland Owner

The situation at Mono Lake is not distinguishable from downstream effects produced by any man-made alteration of a water course, such as a dam. The federal common law rule of accretion has been uniformly applied to recessions caused by man-made alterations of water bodies. The federal common law rule is that the cause of the accretion or reliction is immaterial.[26] The only exception recognized under the federal common law is that "the doctrine of accretion does not extend to land reclaimed by the owner of the adjoining [up]land through filling in land under water and making it dry." *Burns v. Forbes*, 412 F.2d 995, 997 (3rd Cir. 1969). *See also United States v. Harvey*, 661 F.2d 767, 772, n.7 (9th Cir. 1981) (exception from rule when there are "self-employed intentional accretions"). Under federal law the doctrine of accretion *does* extend to confer title on the upland owner when land is uncovered due to the acts of a third party.[27] *Id.* Under the

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[24] It is not the direct intention of Los Angeles to cause a recession of the Lake. That is only a by-product of the diversions.

[25] *Martin v. Busch*, 112 So. 274, 287 (Fla. 1927) and *Padgett v. Central and South Florida Central Dist.*, 178 So.2d. 900, 904 (Fla. App. 1965).

[26] In *Lovingston*, this Court noted: "The proximate cause [of the accretion] was the deposits made by the water. The law looks no further. Whether the flow of the water was natural, or affected by artificial means, is immaterial." 90 U.S. at 69. *See also California ex rel. State Lands Commission*, 457 U.S. at 285; *Beaver v. United States*, 350 F.2d 4, 11 (9th Cir. 1965) ("The erecting of artificial structures does not alter the application of the accretion doctrine. . . . "); *Alexander Hamilton Life Ins. Co. v. Govt. of V.I.*, 757 F.2d 534, 544-545 (8th Cir. 1985).

[27] In *Bonelli*, 414 U.S. at 322-323, this Court stated in dictum: "It would be at odds with the fundamental purpose of the original grant to

facts presented here, the United States neither filled in nor reclaimed land, and in no manner, through its actions, directly caused the recession to occur.

C. There Is No Readily Ascertainable Basis in State Law for Application of An "Intentional Drainage" Rule Under the Facts of this Case

California's posture with respect to the applicability of its law has substantially shifted throughout this litigation. In the trial court, when the district court was determining the choice of law question, the State relied upon *Carpenter v. City of Santa Monica*, 63 Cal. App. 2d 772 (1944). C.R. 26 at 12-16.[28] The State claimed that the *Carpenter* rule confers title on the state when accretion is artificially induced.

Now, faced with this Court's supervening decision in *California ex rel. State Lands Commission*, 457 U.S. at 284, squarely rejecting application of *Carpenter* as a federal rule of decision to determine title to artificially induced accretion on federally owned upland, the State has fashioned a new theory. Instead, the State relies on a statute, Cal. Pub. Res. Code § 7601 (Deering 1976), that it maintains embodies the "common law" exception to the accretion doctrine that when inland lakes are drained for reclama-

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the States to afford a State title to land from which a navigable stream has receded unless the land was exposed as part of a navigational or related public project *of which it was a necessary and integral part* or unless, of course, the artificial accretion was somehow caused by the upland owner himself." *See also* 414 U.S. at 329. Although this dictum conflicts with the Court's earlier statement, 414 U.S. at 327 that "[w]here accretions to riparian land are caused by conditions created by strangers to the land, the upland owner remains the beneficiary thereof," even under this more restrictive test, California cannot prevail here.

[28] In its Memorandum in Support of its Motion for Summary Judgment in the trial court, the State, citing *Carpenter*, argued that "California has created a limited exception to this rule [the common law of accretion] where sovereign land boundaries are concerned by distinguishing between slow and imperceptible changes to the water boundary that are naturally caused and slow and imperceptible changes to such boundary that result from artificial causes." *Id.* at 12.

tion or other purposes, title remains in the state. Pub. Res. Code § 7601 provides:

> Any person desiring to purchase any of the lands uncovered by the recession or drainage of the waters of inland lakes, and inuring to the State by virtue of her sovereignty, shall make an application therefor to the commission. This section shall not affect or apply to any land uncovered by the recession or drainage of the waters of any lake or other body of water, the waters of which are so impregnated with minerals as to be valuable for the purpose of extracting therefrom such minerals.

Pub. Res. Code § 7601 implies a state claim to all lands uncovered by recession or drainage of inland lakes, whether the exposure arises because of an intentional drainage or because of natural causes. Given such broad claims to exposed lake bed lands, the United States, as sovereign owner of uplands, will always lose.[29] To the extent the State relies upon § 7601 as the

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[29] Because of the Equal Footing Doctrine, recognizing title in the states to all lands below inland navigable waters, and the Submerged Lands Act, discussed *supra*, the United States is most commonly an upland owner *vis-a-vis* the states, which are owners of the beds of navigable waters. Although the United States, or an Indian tribe, may on some occasions be the owner of lands submerged below inland waters, *see Utah Div. of State Lands v. United States*, 55 U.S.L.W. 4750 (U.S. June 8, 1987), *reversing* 780 F.2d 1515 (10th Cir. 1985) (reaffirming the presumption against conveyances by the United States of lands beneath navigable waters before a state was admitted in the Union), this will be a rare situation. *See United States v. Aranson*, 696 F.2d 663-66 (9th Cir. 1983). The ownership by the United States of the beds of certain lakes in California, arising from a grant from the State, mentioned in the Petition at 17, n.6, 7, is not indicative of the usual relationship between lands of the United States and the states under the Equal Footing Doctrine. Moreover, under Pub. Res. Code § 7601, only the State as sovereign benefits when the waters recede. California is wrong in its contention that the United States can benefit from § 7601 with respect to lakebeds granted to it by the State since it does not hold such lands by reason of its sovereignty. Petition at 17, n.6, 7. Under § 7601 the United States, like private individuals, can only file "applications" to the State for sale of exposed lakebed.

predicate for a federal rule of decision, that statute expresses a rule completely without any foundation in the common law of accretion.

The State contends it would be inappropriate to apply the common law doctrine of accretion and reliction, otherwise generally recognized by the State. *See* Cal. Civil Code § 1014 (Deering 1971).[30] Rather, it urges this Court to apply as a federal rule of decision the so-called "intentional drainage" exception that awards title to the bed owner when lakes are intentionally drained for reclamation purposes. However, that exception is singularly inappropriate, under the facts of this case, to serve as a federal rule of decision. It is more appropriate to apply the reliction-accretion doctrine, which takes into account changes in water boundaries induced by nonnatural causes. California offers this Court a rule of decision that is predicated solely upon a state statute authorizing applications to purchase exposed lakebed lands. That statue does not express the "intentional drainage" exception offered by California. In fact, the State cites no California authority that recognizes such an exception.[31]

This case thus presents the flip side of the *Wilson* situation. There, the state rule was certain, the federal common law rule unsettled. Here, the federal common law rule is settled, the suggested state rule of decision aberrational, idiosyncratic, and, at best, only inferrable, rather than expressly recognized, from the "authorities" cited by the State. Here, it is the State that is attempting to "fashion" a state rule that would properly serve as

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[30] Civil Code § 1014 provides: "Where, from natural causes, land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank."

[31] *City of Los Angeles v. Aitken*, 10 Cal. App. 2d 460, 52 P.2d 585 (1935), cited by Petitioner, held only that private littoral owners at Mono Lake were entitled to monetary damages for a taking of their littoral rights of access as a result of the diversions by the city. The court's opinion never discusses, let alone decides, the question of ownership of the exposed lakebed, and did not affirm the award of damages based on loss of title.

the federal rule of decision. What it has fashioned is not appropriate to the facts here presented.

D. Application of A State Rule of Decision Would Injure Federal Interests

Application of the rule of decision urged by the State would make the federal uplands no longer contiguous with the waters of Mono Lake. To apply a state rule of decision would result in creation of a band of state owned land between federal lands withdrawn for recreational and grazing uses and Mono Lake. Application of the federal common law rule of accretion would be consistent with federal interests and promote the intent of Congress in withdrawing the federal uplands in 1931.

III. THE COMMON LAW OF PERCEPTIBILITY IS A RULE OF REASON REQUIRING THAT THE PROCESS OF LAND EXPOSURE NOT BE OBSERVABLE AS IT IS HAPPENING

The State's view of the perceptibility criterion in the federal common-law of accretion-reliction is likewise an aberrant one that has been rejected almost universally. The state argues that in order for a change to be characterized as avulsive, it has only to be observable over a period of time, not perceptible to the ordinary observer as it occurs.

This view of the perceptibility criterion was rejected in *Jefferis v. East Omaha Land Co.*, 134 U.S. 178 (1890). There this Court held that the doctrine of accretion applied to the Missouri River despite the fact that "the river cuts away its banks, sometimes in a large body, and makes for itself a new course, while the earth thus removed is almost simultaneously deposited elsewhere, and new land is formed almost as rapidly as the former bank was carried away." 134 U.S. at 189. This Court applied the doctrine of accretion in this instance although "at intervals of not less than three or more months it could be discerned by the eye that additions greater or less had been made to the shore." 134 U.S. at 192. This Court indicated its agreement with the doctrine of the English cases that "accretion is an addition to land coterminous with the water, which is formed so slowly that its progress cannot be perceived, and does not admit of the view that, in order to be

accretion, the formation must be one not discernible by comparison at two distinct points of time." 134 U.S. at 193.[32] *See also County of St. Clair v. Lovingston*, 90 U.S. at 68-69.

The classic common law definition of perceptibility formulated by Bracton, *Book II*, Ch. 1, cited with approval in *Jefferis*, 134 U.S. at 192, states:

> Alluvion is a latent increase, and that is said to be added by alluvion, whatever is so added by degrees, that it cannot be perceived at what moment of time it is added; for although you fix your eyesight upon it for a whole day, the infirmity of sight cannot appreciate such subtle increments, as may be seen in the case of a gourd, and such like.

As this Court further noted in *Jefferis*, Bracton's formulation of the test is based upon Justinian, who commented that the addition must be made so slowly "ut intellegere non possis, quantum quoque momento temporis adiciatur." *Id.* at 192 (quoting *Institutes*, 2.1.20). ("One cannot perceive the change (or increment) as it is happening (or being added).")

Petitioner, at 24, cites *Attorney-General v. Reeve*, 1 Times L.R. 675 (1885), for the proposition that there cannot be accretion if the change in a shoreline is apparent over the course of a day or hours. However, in *Reeve* the witnesses testified that the change was perceptible because of certain marks on the ground that enabled them to perceive the course of shoreline change over hours. Thus, *Reeve* holds at best that if change is perceptible because of marks on the ground, accretion has not occurred.

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[32] In *Bonelli Cattle Co.*, this Court signalled a willingness to consider even perceptible changes accretive under some circumstances. This Court stated in *dictum*:

> The [earlier] advance of the Colorado's waters divested the title of the upland owners in favor of the State in order to guarantee full public enjoyment of the watercourse. But, when the water receded from the land, there was no longer a public benefit to be protected; consequently, the State, as sovereign, has no need for title. *That the cause of the recession was artificial, or that the rate was perceptible, should be of no effect.*

414 U.S. at 323-24 (emphasis added).

The English common law courts have declined to follow *Reeve*. The court's reasoning in *Reeve* was exhaustively critiqued by the King's Bench in *Attorney General v. McCarthy*, 2 I.R. 260 (1911). There the Court refused to follow *Reeve* because it was predicated on a misreading of Lord Hale's treatise on the law of the sea and contrary to *Gifford v. Yarborough*, 5 Bing. 163, 2 Bligh (N.S.) 147; 1 Dow and Cl. 178, *sub. nom. Rex v. Lord Yarborough*, 3 B and C 91 (1824), which, as the leading English case on the law of accretion, held that where land is added by a process of recession that is not perceptible in its progress, the owner of the uplands acquires the title, notwithstanding the existence of marks or bounds or other evidence by which the former line of ordinary high water mark can be ascertained. 2 I.R. at 276.[33] *See also State by Kay v. Sause*, 342 P.2d 803, 820 (Ore. 1959) (presence of ascertainable boundaries does not prevent application of rules of accretion, citing *Attorney-General v. McCarthy*).[34]

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[33] The Court characterized *Reeve* as relying upon an "unfortunate dictum" in *Attorney General v. Chambers*, 45 Eng. Rep. 22, 27 (1859), that has had an "unsettling and confusing effect on the administration of the law." 2 I.R. at 289. *See also* a critique of *Chambers* in Halsbury's *Laws of England*, Water, § 298, n.4. Disavowing the holding in *Chambers*, Halsbury maintains that the accretion doctrine applies, "notwithstanding that the former boundaries of the land concerned were defined or ascertainable." *Id.*

[34] Petitioner cites a number of cases for the proposition that courts have found that changes were not gradual and imperceptible even though the changes were not observable as they occurred. Petition at 24. This is a distinctly minority view, if it exists. The cases cited by petitioner do not stand for the asserted proposition. In *McCafferty v. Young*, 397 P.2d 96, 99 (Mont. 1964), the Court appeared to base its finding of avulsion on sudden changes that had occurred when extraordinary flood conditions prevailed in 1918. In *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983), the Court, applying Washington law that required a finding of "suddenness", 717 F.2d. at 1262-1263, determined that a rechanneling project of the Corps of Engineers, which had caused a river to change its course, was avulsive. The Court did not base its holding on an interpretation of the common law perceptibility criterion. 717 F.2d at 1263. *People v. William Kent*

Petitioner asks this Court to adopt the reasoning of the Special Master in *Utah v. United States*, 420 U.S. 304 (1975).[35] In *Utah*, the Special Master had to determine the amount of money owed by Utah as a result of a quitclaim deed by the United States purporting to convey its interest in lands exposed by recession of the Great Salt Lake. After the date of the quitclaim deed, a rising trend in lake elevation had brought the Great Salt Lake to within a few inches of its statehood level, reinundating the area which had been exposed after statehood. As of the date of hearing before the Special Master on February 27, 1973, nearly all of the exposed land had been resubmerged. Report at 24.[36] The rapid rise in elevation of the Lake since 1967, the date of the quitclaim deed by the United States, persuaded the Special Master that the "situation had not prior to or on June 15, 1967, reached a state of stability or reasonable permanence." Report at 25.[37] The Special Master then set forth his reasoning in greater detail for deciding that the doctrine of accretion-reliction had no applicability to Great Salt Lake and that title to the exposed lakebed had not vested in the United States as upland owner. He stated:

> The doctrines of accretion and reliction contemplate ambulation in title boundaries; but the valuable features of riparian ownership, particularly those incident to maintaining access to the water, and the compensation theory referred to in *Bonelli, supra*, 414 U.S. at 326, seem to the Special Master to envisage a situation different from the special relation of

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Estate Co., 242 Cal. App. 2d 156, 51 Cal. Rptr. 215 (1966) simply stands for the unremarkable proposition that annually recurrent changes in the exposure of oceanfront beach do not constitute accretion or reliction. Intervenors have discovered no case that applies the doctrine of accretion to such impermanent, seasonal changes.

[35] This was a memorandum decision of the Supreme Court directing the entry of a decree proposed by the Special Master.

[36] The Special Master's Report is not reported.

[37] In contrast with Great Salt Lake, at Mono Lake there has been an unambiguous downward trend in lake elevation since 1919, except during the unusually wet years 1983-1984 and from 1938-1946. CE-2A, Figure IV-10B.

> the waters of the Great Salt Lake to the riparian land. Such a relation seems inconsistent with the stability which should pertain to a change in title by operation of law. In providing for payment by Utah to the United States of such interests as the United States might be found to have conveyed to the State by the quitclaim deed of June 15, 1967, the statute of June 3, 1966 is indicative of a congressional assumption that such payment would be required only if the situation at that date was reasonably permanent in nature rather than temporary, as the history of the Lake has demonstrated it to have been.

Report at pp. 25-26.

The Special Master was construing congressional intent with respect to the consideration for a conveyance and did not believe Congress intended to make the State of Utah pay hundreds of thousands of dollars for the 325,000 acres of exposed lands that were, at the time of the decision, inundated because the lake level had risen nearly to its historical 1870 high mark.[38] *See* Report at 9, 24-26.[39]

By urging this Court to hold that shoreline migration perceptible over the course of hours or a day is not accretive, Petition at 22 *et seq.*, the State refuses to accept the common law rule that only such shoreline migration that is perceptible at the moment it is occurring is avulsive. Under the common law, avulsive changes are rare since they are sudden and dramatic. Petitioner would have such avulsive changes commonplace in Mono Lake, occur-

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[38] The Special Master noted that for 10 days prior to June 15, 1967, the date of the quitclaim deed, the lake level fluctuations inundated or exposed between 10,000 and 20,000 acres with each fluctuation. Report at 18.

[39] In any event, the views of the Special Master concerning the application of the common law perceptibility test to Great Salt Lake are *obiter dicta*, or at best an alternate holding, and are of no precedential value. This Court did *not* adopt the findings, discussion, and conclusions of the Special Master. *See* 420 U.S. at 304. This Court simply directed the entry of the decree proposed by the Special Master, with some modifications agreed to by the parties. *Id.* at 304-06.

ring regularly since upstream diversions commenced in 1941. Such a result turns the common law presumption favoring accretion on its head,[40] and ignores the trial court's finding that no one, including the State's own expert, has observed such shoreline migration as it is occurring.[41] California is thus the proponent of a definition of perceptibility that would reverse a presumption fashioned centuries ago to protect the "vested right" of upland owners to retain "an inherent and essential attribute of the original property." *County of St. Clair v. Lovingston*, 90 U.S. at 68-69.

CONCLUSION

For the foregoing reasons, the State's Petition should be denied.

DATED: June 26, 1987

Respectfully submitted,

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[40] *Peterson v. Morton*, 465 F. Supp. 986, 999 (D. Nev. 1979), *vacated in part and remanded on other grounds*, 666 F.2d 361 (9th Cir. 1982).

[41] R.T. 593-594, 608-609. *See* also C.R. #108, ¶¶ 23, 32.